

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANNIE DUONG

Claimant

VS.

U.S.D. 259

Self-Insured Respondent

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Docket No. 1,034,465

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 15, 2008, Award entered by Administrative Law Judge Thomas Klein. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Robert G. Martin, of Wichita, Kansas, appeared for the self-insured respondent. This matter was placed on the Board's summary calendar for determination without oral argument.

The Administrative Law Judge (ALJ) found that claimant sustained an injury that arose out of and in the course of her employment with respondent. However, the ALJ found that claimant had no impairment as a result of her injury. Respondent was ordered to pay the expenses of the case and to provide claimant with future medical treatment upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, by Stipulation filed May 16, 2008, the parties agreed that the February 14, 2008, report of Paul S. Stein, M.D., and the December 5, 2007, report of George G. Fluter, M.D., are admissible into evidence for all purposes and, therefore, these reports were considered by the Board in this review.¹

¹ Although this Stipulation of evidence into the record was not listed by the ALJ under either the "Records" or the "Stipulations" portions of the Award, it was mentioned in the body of the Award under "Findings of Fact and Conclusions of Law" and so these reports were obviously considered by the ALJ. Furthermore, as Dr. Stein's independent medical examination was conducted pursuant to an Order for same by the ALJ dated January 17, 2008, Dr. Stein's report and opinions were part of the record even absent a stipulation by the parties. See K.S.A. 44-510e(a) and K.S.A. 44-516.

ISSUES

In her Application for Review by Workers' Compensation Appeals Board, claimant requested review of the ALJ's findings concerning the nature and extent of her injuries and "all other appealable issues."² Claimant did not file a brief to the Board but instead relied upon her submission brief to the ALJ. In that submission brief, the only issue listed by claimant was: "What is the nature and extent of claimant's disability?"³

Respondent did not file a brief in this appeal, nor did respondent file a submission brief to the ALJ.

Accordingly, the only issue for the Board's review is: What is the nature and extent of claimant's impairment?

FINDINGS OF FACT

Claimant claimed she injured her back in September 2006 and each day worked thereafter as a result of repetitive overuse and lifting while performing her job in the food production center at respondent. At the regular hearing, the parties agreed to an accident date of September 6, 2006. The parties also stipulated to the issues concerning compensability, and the sole issue for the ALJ was the nature and extent of claimant's permanent disability.

Claimant was treated by Dr. Alan Moskowitz. He initially recommended over-the-counter Ibuprofen, but it made claimant sick, so she switched to another over-the-counter medication. Claimant was also prescribed physical therapy and referred for an epidural injection in her low back. This afforded her only temporary relief from her back symptoms. Nevertheless, she continued to work for respondent in the same job without restrictions. An MRI of claimant's lumbar spine performed on February 20, 2007, was interpreted as unremarkable, although Dr. Moskowitz felt there might be evidence of mild L5-S1 degenerative change.

Claimant was examined by Dr. George Fluter on December 5, 2007, at the request of claimant's attorney. Claimant had a previous work-related injury to her left knee in February 2005 that resulted in left knee arthroscopic surgery by Dr. Pat Do in August 2006. Dr. Fluter diagnosed claimant's low back problems as myofascial pain affecting the low back. He opined that there was a causal/contributory relationship between claimant's current condition and repetitive work activities, in conjunction with gait alteration following

² Form K-WC E-1, Application for Hearing filed May 1, 2007.

³ Claimant's Submittal Letter at 2 (filed July 16, 2008).

her left knee injury and subsequent surgery. Using the *AMA Guides*,⁴ he rated claimant as having a Diagnosis Related Estimate (DRE) lumbosacral Category II impairment, for a 5 percent permanent partial impairment to the body as a whole.

Dr. Fluter gave claimant restrictions of lifting, carrying, pushing and pulling up to 35 pounds occasionally and 15 pounds frequently. He also restricted her bending, stooping, twisting, squatting, kneeling, crawling and climbing to an occasional basis. He had no recommendations for future medical treatment at the time of his examination.

Dr. Paul Stein performed an independent medical examination of claimant on February 14, 2008, at the order of the ALJ. After examining claimant and reviewing her medical records, Dr. Stein believed that she suffered a mild to moderate back strain from her work activity. He did not believe that there was a relationship between her back discomfort and the knee injury and/or surgery.

Dr. Stein rated claimant as being in DRE Category 1 of the *AMA Guides* and opined she had no percentage of permanent impairment to her low back. He said claimant did not fit into category II (5 percent impairment) because "there is no history of injury to the back, no muscle spasm, no guarding, and no radicular symptomatology."⁵ He found no structural or pathological basis for permanent work restrictions. He suggested that claimant should continue her work, taking occasional ibuprofen, or consider employment that does not stress her low back as much.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2007 Supp. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁵ Paul S. Stein report of examination of February 14, 2008 (filed May 16, 2008, by Stipulation).

44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. . . . If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

ANALYSIS

The Board agrees with the ALJ's determination that claimant suffered a work-related low back injury but that the 0 percent opinion of the court-ordered IME physician, Dr. Paul Stein, is the most credible in this instance. Dr. Stein was the last physician to examine claimant, and at that time she did not demonstrate muscle spasm or guarding. Claimant has continued to perform her regular job duties without restrictions or accommodation, although with discomfort. Dr. Stein placed claimant in the DRE Category I, which is a 0 percent impairment. The Board agrees and adopts the findings and conclusions of the ALJ.

CONCLUSION

Claimant suffered personal injury by a series of accidents which arose out of and in the course of her employment with respondent, and, pursuant to the *AMA Guides*, this injury has resulted in a 0 percent permanent impairment of function.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated September 15, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Robert G. Martin, Attorney for Self-Insured Respondent
Thomas Klein, Administrative Law Judge